**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

STATE OF NORTH DAKOTA, *et al.*,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Defendants.

Civil Action No. 3:15-cv-00059

DEFENDANTS' RESPONSE TO PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

In 2015, the United States Environmental Protection Agency ("EPA") and Department of the Army, United States Army Corps of Engineers ("Army" or "Corps") (together, "the Agencies") promulgated a rule that revised the definition of "waters of the United States" under the Clean Water Act ("CWA").[1] The Rule never went into effect nationwide. This Court enjoined the Rule in the thirteen Plaintiff States before it took effect. *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1055 (D.N.D. 2015). Other courts have similarly enjoined the 2015 Rule. At this time, it is preliminarily enjoined in 24 states. In addition, the Agencies have amended the 2015 Rule to add an applicability date of February 6, 2020 ("the Applicability Rule"). 83 Fed. Reg. 5200 (Feb. 6, 2018).[2]

The Agencies have the clear legal authority to reconsider the rules of prior administrations. Pursuant to the President's 2017 Executive Order, the Agencies are engaged in two such related rulemakings. In the first, the Agencies have proposed to repeal the 2015 Rule. In the second, the Agencies are preparing to propose a new definition of "waters of the United States." In light of these proposed rulemakings and the Applicability Rule, the States' claims are not ripe for review. Instead, the rulemaking process—not litigation—is the best way forward. The Agencies have proposed to take action that, if finalized, would eliminate the complex challenges this case raises. This Court need not entangle itself in them; it should decline further involvement "until an administrative decision has been formalized." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003).

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[1] *See* Clean Water Rule: Definition of 'Waters of the United States,' 80 Fed. Reg. 37,054 (June 29, 2015) ("2015 Rule" or "Rule").

[2] Thus, subject to further action by the Agencies, until the February 6, 2020 applicability date of the 2015 Rule, the Agencies will administer the regulations in place prior to the Rule. They will continue to interpret the statutory term ''waters of the United States'' to mean the waters covered by those regulations, as implemented prior to 2015, consistent with Supreme Court decisions and practice, and as informed by applicable agency guidance documents. 83 Fed. Reg. at 5201.

If the Court nevertheless proceeds to the merits, the Agencies here only respond to a portion of Plaintiffs' claims. The Agencies have proposed the repeal of the 2015 Rule and are actively reconsidering many of the substantive questions raised by Plaintiffs. After receiving public comment, including those from parties to this case, the Agencies will decide whether the 2015 Rule should be repealed, modified, or retained. The Agencies maintain an open mind. So, while the Agencies' prior briefs and statements (made at a time when the rulemaking posture was different) are a matter of public record, the Agencies take no current position on the substantive issues currently being reconsidered.

As to the procedural challenges to the 2015 Rule, however, the Court should deny the motions for summary judgment. *First*, the 2015 Rule, as an action of the EPA Administrator, is statutorily exempt from the requirements of the National Environmental Policy Act. This exemption extends to the Army for purposes of defining "waters of the United States" in the Clean Water Act. *Second*, Plaintiff-Intervenor's challenge to the 2015 Rule's inclusion of interstate waters is untimely. The Agencies did not reconsider, and made no changes to, the jurisdictional status of interstate waters. Thus, the Agencies did not restart the time period for judicial review as to that specific issue. *Third*, Plaintiffs do not meet their burden of demonstrating that, on the record here, aspects of the 2015 Rule were not a logical outgrowth of the proposed rule. *Fourth*, Plaintiffs do not meet their burden of demonstrating that the Agencies failed to provide adequate opportunity to comment on the Science Report they issued with the Proposed Rule.

FACTUAL AND LEGAL BACKGROUND

I. The Clean Water Act and Implementing Regulations

The CWA generally prohibits "the discharge of any pollutant by any person," 33 U.S.C. § 1311(a), unless the discharger "obtain[s] a permit and compl[ies] with its terms." *Middlesex Cty. Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981) (citation omitted).[3] A "discharge of a pollutant" occurs when a person adds "any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). "[N]avigable waters," in turn, are "the waters of the United States." 33 U.S.C. § 1362(7).

The Agencies, which are charged with implementing the CWA, "must necessarily choose some point at which water ends and land begins," but "[w]here on this continuum to find the limit of 'waters' is far from obvious." *United States v. Riverside Bayview Homes,* 474 U.S. 121, 132 (1985). The Corps first promulgated regulations defining "waters of the United States" in 1977. *See* 42 Fed. Reg. 37,122, 37,144 (July 19, 1977). In the late 1980s, the Agencies adopted regulatory definitions of that statutory phrase substantially similar to the 1977 definition.[4] *See*

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[3] The CWA establishes two permitting programs for authorization to discharge pollutants to "waters of the United States." *See* 33 U.S.C. §§ 1342 & 1344; *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009). EPA administers the CWA section 402 National Pollutant Discharge Elimination System ("NPDES") program, under which persons may discharge pollutants downstream under certain conditions. The Corps administers the CWA section 404 program, issuing permits for the discharge of dredged or fill material. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 626 (2018).

[4] The Agencies then defined "waters of the United States" as:

> All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce . . . All interstate waters including interstate wetlands. . . . All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), including . . . . Tributaries of waters identified in . . . this section; The territorial sea; and Wetlands adjacent to waters (other than waters that are themselves wetlands) identified . . . in this section. . . .

Cont.

51 Fed. Reg. 41,206, 41,216-17 (Nov. 13, 1986); 53 Fed. Reg. 20,764, 20,765 (June 6, 1988). Thus, as of 2015, the Agencies had interpreted and implemented essentially the same definition of "waters of the United States" for nearly forty years.

Over those four decades, the Agencies refined their longstanding regulatory definition of "waters of the United States" through guidance documents and agency practice, as informed by Supreme Court decisions. *See, e.g.*, *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cty.* v. *U.S.. Army Corps of Eng'rs*, 531 U.S. 159 (2001). Though "imperfect," this decades-old program provides a measure of certainty and predictability. *See In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804, 808 (6th Cir. 2015) (describing the "familiar" pre-2015 Rule regime).

II. The 2015 Rule and Ensuing Litigation

The administrative and judicial background in this case is complex. Since the Agencies promulgated the "WOTUS" Rule in 2015, there have been many administrative and judicial developments. Significantly, at present, the 2015 Rule is *not* being implemented anywhere: It is judicially enjoined in 24 states. More than that, nationwide the Agencies added an applicability date of February 6, 2020, to the Rule. And, the Agencies have proposed a rule that would repeal the 2015 Rule if finalized.

A. The 2015 "Waters of the United States" Rule

In June 2015, the Agencies promulgated the 2015 Rule, revising the regulatory definition of "waters of the United States." *See* 80 Fed. Reg. 37,054. A stated purpose of the 2015 Rule was to "increase CWA program predictability and consistency by clarifying the scope of 'waters

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40 C.F.R. § 232.2 (effective to Aug. 28, 2015, applicable until February 6, 2020); *see also* 33 C.F.R. § 328.3 (effective to Aug. 28, 2015, applicable until February 6, 2020, and containing nearly identical text).

of the United States' protected under the Act." *Id.* The 2015 Rule placed waters into three categories: (A) waters that are categorically "jurisdictional by rule" in all instances (*i.e.*, without the need for any additional analysis); (B) waters that are subject to case-specific analysis to determine whether they are jurisdictional, and (C) waters that are categorically excluded from jurisdiction.

"Jurisdictional by Rule" Waters. Waters that are "jurisdictional by rule" include (1) waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide; (2) interstate waters, including interstate wetlands; (3) the territorial seas; (4) impoundments of waters otherwise identified as jurisdictional; (5) tributaries of the first three categories of "jurisdictional by rule" waters; and (6) waters adjacent to a water identified in the first five categories of "jurisdictional by rule" waters, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters. *See id.* at 37,104.

The 2015 Rule added definitions of key terms including, as relevant here, "tributaries" and "neighboring" adjacent waters that are "jurisdictional by rule." *See id.* at 37,105. Specifically, a tributary under the 2015 Rule is a water that contributes flow, either directly or through another water, to a water identified in the first three categories of "jurisdictional by rule" waters and that is characterized by the presence of the "physical indicators" of a bed and banks and an ordinary high water mark. And "neighboring" adjacent waters are those located:

- within 100 feet of the ordinary high water mark of a category (1) through (5) "jurisdictional by rule" water;

- within the 100-year floodplain of a category (1) through (5) "jurisdictional by rule" water and not more than 1,500 feet from the ordinary high water mark of such water;
- within 1,500 feet of the high tide line of a category (1) though (3) "jurisdictional by rule" water; and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes.

Id. at 37,105.

Case-Specific Waters. In addition to the six categories of "jurisdictional by rule" waters, the 2015 Rule identifies certain waters that are subject to a case-specific analysis to determine if they have a "significant nexus" to a water that is jurisdictional. *Id*. at 37,104-05. The first category consists of five specific types of waters: prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. *Id*. at 37,105. The second category consists of all waters located within the 100-year floodplain of any category (1) through (3) "jurisdictional by rule" water and all waters located within 4,000 feet of the high tide line or ordinary high water mark of any category (1) through (5) "jurisdictional by rule" water. *Id.*

The 2015 Rule defines "significant nexus" to mean a water, including wetlands, that either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a category (1) through (3) "jurisdictional by rule" water. 80 Fed. Reg. 37,106. "For an effect to be significant, it must be more than speculative or insubstantial." *Id*. The term "in the region" means "the watershed that drains to the nearest" primary water.[5] Under the 2015 Rule, to determine whether a water, alone or in combination with similarly situated waters across a watershed, has a significant nexus, one must look at nine functions such as sediment trapping, runoff storage, provision of life cycle dependent aquatic habitat, and other functions. *Id.*

Exclusions. The Agencies also retained exclusions from the definition of "waters of the United States" for prior converted cropland and waste treatment systems. *Id.* at 37,105. In addition, the Agencies codified several exclusions that reflected longstanding agency practice, and added others such as "puddles" and "swimming pools" in response to public comments on the proposed 2015 Rule. *Id.* at 37,096-98, 37,105.

B. Litigation Surrounding the 2015 Rule

Once published, the 2015 Rule was immediately challenged by thirty-one states and many other parties in district and appellate courts spanning the country, including this Court. 83 Fed. Reg. at 5201. Several parties, including the Plaintiff States here, sought to enjoin the 2015 Rule. On August 27, 2015—the day before the 2015 Rule was to take effect—this Court enjoined the Rule in the thirteen Plaintiff States, holding that Plaintiffs "are likely to succeed on the merits of their claim." *See North Dakota v. EPA*, 127 F. Supp. 3d at 1055.

Meanwhile, petitions for review of the 2015 Rule were consolidated in the Sixth Circuit Court of Appeals. On October 9, 2015, that court issued a nationwide stay of the 2015 Rule pending further proceedings. *See In re EPA*, 803 F.3d 804. It "conclude[d] that petitioners have demonstrated a substantial possibility of success on the merits of their claims." *Id.* at 806. Noting "the sheer breadth of the ripple effects caused by the Rule's definitional [changes]," the Sixth Circuit stayed the 2015 Rule to "restore uniformity of regulation under the familiar, if imperfect, pre-Rule regime, pending judicial review." *Id.* at 808. Consistent with the Sixth Circuit's stay order, the Agencies thereafter returned to their longstanding practice of applying, nationwide, the definition of "waters of the United States" set forth in their 1980s regulations, as informed by guidance, agency practice, and relevant case law. 83 Fed. Reg. at 5201. Thus, the 2015 Rule was only applicable for approximately six weeks, from August 28, 2015, to October 9, 2015—and only in the parts of the country not covered by this Court's preliminary injunction.

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[5] A "primary" water is a category (1) through (3) "jurisdictional by rule" water.

In the Sixth Circuit litigation, many of the parties argued that the court did not have jurisdiction over the challenges under 33 U.S.C. § 1369(b)(1). The Sixth Circuit held that it had jurisdiction, and the Supreme Court granted certiorari. *See In re U.S. Dep't of Def.*, 817 F.3d 261 (6th Cir. 2016), *cert. granted*, *Nat'l Ass'n of Mfrs. v. DOD*, 137 S. Ct. 811 (2017), *rev'd*, 138 S. Ct. 617 (2018).

III. The Presidential Executive Order and Administrative Reconsideration

On February 28, 2017, the President of the United States signed an Executive Order directing the Agencies to reconsider the 2015 Rule. Exec. Order No. 13,778, 82 Fed. Reg. 12,497. The order declared it to be "in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." *Id.* § 1.

Consistent with the President's directive, in July 2017 the Agencies proposed to repeal the 2015 Rule. If finalized, this proposal would recodify the prior regulatory definition of "waters of the United States," promulgated by the Agencies in the late 1980s. "Definition of 'Waters of the United States'−Recodification of Pre-Existing Rules." 82 Fed. Reg. 34,899 (July

27, 2017). In response to the proposal, the Agencies received more than 685,000 comments. *See* https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-0001 (rulemaking docket).

Upon consideration of the comments received, on July 12, 2018, the Agencies published a Supplemental Notice of Proposed Rulemaking, to clarify that they are proposing to permanently repeal the 2015 Rule in its entirety. 83 Fed. Reg. 32,227. The Supplemental Notice also reiterates that the Agencies are proposing to recodify the pre-2015 regulations, and to implement the longstanding regulatory framework that is currently being administered by the Agencies, while the Agencies continue to consider a new definition of "waters of the United States." *Id.* The Agencies further stated that the promulgation of the Applicability Rule (adding an applicability date to the 2015 Rule) does not change the Agencies' decision to proceed with the proposed repeal of the 2015 Rule. *Id.* at 32,228.

The Agencies are proposing to repeal the 2015 Rule for several reasons, including: (1) there is substantial uncertainty associated with the 2015 Rule for regulators, the regulated community, and the public resulting from legal challenges and preliminary rulings by several courts[6]; and (2) the Agencies are concerned that certain findings and assumptions supporting adoption of the 2015 Rule were not correct, and that these conclusions, if erroneous, may separately justify repeal of the 2015 Rule. *Id.* at 32,228; 32,237-39. The Agencies are also considering the preliminary, adverse legal findings of various courts (including this one), and whether to accept and adopt one or more of those preliminary conclusions of law, including whether to conclude that the 2015 Rule exceeds EPA's authority under the Clean Water Act.. *Id.* at 32,228; 32,238; 32,340.

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[6] In addition to the preliminary injunction issued by this Court, the Southern District of Georgia has preliminarily enjoined the 2015 Rule in eleven states that are plaintiffs in another challenge to the 2015 Rule, and six more states have also sought a preliminary injunction in cases filed in the Southern District of Texas and the Southern District of Ohio. *See Texas v. EPA*, Case No. 3:15-cv-162 (S.D. Tex.); *Ohio v. EPA*, Case No. 2:15-cv-02467 (S.D. Ohio).

Thus, the Agencies have proposed to conclude that regulatory certainty would be best achieved by permanently repealing the 2015 Rule and recodifying the scope of CWA jurisdiction currently in effect. *Id.* at 32,228; 32,239-40. The Agencies also propose to conclude that rather than achieving its stated objectives of increasing predictability and consistency under the CWA, *see* 80 Fed. Reg. at 37,055, the 2015 Rule is creating significant confusion and uncertainty for states, tribes, local governments, agency staff, regulated entities, and the public, particularly in view of court decisions that have cast doubt on the legal viability of the rule. *Id.*

IV. The Applicability Rule

In November 2017, the Agencies also proposed and solicited public comment on the Applicability Rule. 82 Fed. Reg. 55,542 (Nov. 22, 2017). The Agencies' purpose was to provide "regulatory continuity and clarity for the many stakeholders affected by the definition of 'waters of the United States'" in light of, *inter alia*, the Supreme Court's then-pending subject matter jurisdiction ruling; the Sixth Circuit's then-effective nationwide stay of the 2015 Rule; this Court's preliminary injunction of the Rule in the thirteen Plaintiff States; the President's Executive Order; and the Agencies' ongoing administrative reconsideration of the 2015 Rule. *Id.* at 55,542-44. The Agencies proposed that postponing application of the 2015 Rule for two years would "ensure that there is sufficient time for the regulatory process for reconsidering the definition of 'waters of the United States' to be fully completed." *Id.* at 55,544. The Agencies explained the long-term merits of the 2015 Rule would be addressed by other rulemakings. *Id.* at 55,545.

Many states, industry groups, environmental groups, and individual citizens submitted comments in response to the Applicability Rule proposal. For example, twenty-one states, including Plaintiffs in this case, expressed support for the Applicability Rule. Exhibit 1 (state comment letter supporting proposal to add applicability date to 2015 Rule), also available at https://www.regulations.gov/docket?D=EPA-HQ-OW-2017-0644 (Applicability Rule docket). These States encouraged the Agencies to repeal the 2015 Rule, and also to propose and adopt a narrower definition of "waters of the United States." *Id.*

On January 22, 2018, the Supreme Court overturned the Sixth Circuit's jurisdictional ruling.[7] It held that, under CWA section 509(b)(1), 33 U.S.C. § 1369(b)(1), "any challenges to the Rule . . . must be filed in federal district courts." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. at 624. Therefore, the Sixth Circuit later vacated its stay of the 2015 Rule and dismissed all challenges brought in the Courts of Appeals for lack of jurisdiction. *In re U.S. Dep't of Def.*, 713 Fed. App'x 489 (6th Cir. 2018).

On February 6, 2018, the Agencies took final action on the Applicability Rule. *See* 83 Fed. Reg. at 5200. In that final rule, the Agencies found that an applicability date of February 6, 2020, would serve the public interest by maintaining the pre-2015 regulatory framework for a time so that only one regulatory definition of "waters of the United States" will be applicable throughout the entire United States. *See* 83 Fed. Reg. at 5202 ("[T]he agencies recognize the need to provide clarity, certainty, and consistency nationwide."). The Agencies concluded the alternative would be a patchwork of regulation, depending on the geographic extent of the courts' injunctions of the 2015 Rule, and undesirable for most stakeholders. "Having different regulatory regimes in effect throughout the country would be complicated and inefficient for both the public and the agencies." *Id.* The Applicability Rule therefore:

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[7] *See In re U.S. Dep't of Def.*, 817 F.3d 261 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 811 (2017).

> . . . establishes a framework for an interim period of time that avoids these inconsistencies, uncertainty, and confusion, pending further rulemaking action by the agencies. The rule ensures that, during an interim period, the scope of CWA jurisdiction will be administered nationwide exactly as it is now being administered by the agencies, and as it was administered prior to the promulgation of the 2015 Rule.

83 Fed. Reg. at 5202. As a result of the judicial injunctions and Applicability Rule, the 2015 Rule has never been applied nationwide.

V. Continuation of this Litigation

After the Supreme Court's determination that challenges to the 2015 Rule should be brought in district courts, a subset of the Plaintiff States sought to lift the stay of litigation previously entered by the Court. ECF No. 165 (motion of seven State Plaintiffs). The other six State Plaintiffs opposed that motion, asserting that the Agencies' rulemaking process should be allowed to play out and that "lifting the stay at this time would be premature." ECF No. 178 at 1, 2. The Agencies also opposed lifting the stay and requested a further stay of this litigation. ECF No. 175 (motion), 175-1 (memorandum) (citing this Court's preliminary injunction ruling, the Applicability Rule, and the Agencies' two-step rulemaking process to propose a repeal of the 2015 Rule and a new definition of "waters of the United States"). The Court denied the Agencies' motion to continue the stay, and entered a briefing schedule for summary judgment briefing on the merits of Plaintiffs' and Plaintiff-Intervenor's claims. ECF No. 185 (Order lifting stay); ECF No. 199 (Order denying appeal of Magistrate Judge's Order lifting stay); ECF No. 200 (Scheduling Order).

STANDARD OF REVIEW

Plaintiffs and Plaintiff-Intervenor bring their claims under the Administrative Procedure Act ("APA"). Under the APA, a court may set aside agency actions "found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2)(A). "[W]hen a party seeks review of agency action under the APA [before a district court], the district judge sits as an appellate tribunal." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001); *see also Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1225 (D.C. 1993). Challenges to agency action under the APA are properly adjudicated on cross-motions for summary judgment. *See, e.g., Fulbright v. McHugh*, 67 F. Supp. 3d 81, 89 (D.D.C. 2014), *aff'd sub nom. Fulbright v. Murphy*, 650 F. App'x 3 (D.C. Cir. 2016). Judicial review, however, is limited to the administrative record compiled and relied upon by the agency. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971). "By confining judicial review to the administrative record, the APA precludes the reviewing court from conducting a de novo trial and substituting its opinion for that of the agency." *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 766 (8th Cir. 2004). The burden is on the plaintiff to prove that the agency's action was arbitrary or capricious. *See South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 800 (8th Cir. 2005).

ARGUMENT

The Plaintiffs' claims are not ripe for adjudication. The 2015 Rule is not currently applicable. The Agencies are actively reconsidering the 2015 Rule—including the substantive issues raised by the Plaintiffs here. The Court should decline a "premature adjudication" of these issues "until an administrative decision has been formalized." *Nat'l Park Hosp. Ass'n v. Dept. of Interior*, 538 U.S. at 807 (citing *Abbot Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)). Thus, the Agencies do not state a position on the substantive issues subject to reconsideration. But if the Court reaches Plaintiffs' procedural challenges to the 2015 Rule, it should deny them.

I. The claims are not prudentially ripe.

In addition to constitutional limitations on the federal courts, "prudential considerations must justify the present exercise of judicial power." *Gopher Oil Co. v. Bunker*, 84 F.3d 1047, 1050 (8th Cir. 1996) (citations and quotations omitted). A court will decline to exercise jurisdiction over a matter as prudentially unripe when it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all. *Neb. Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1037 (8th Cir. 2000) (citing *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)). This doctrine is designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hosp.*, 538 U.S. at 807-08 (internal quotation marks and citations omitted). To decide whether a matter is ripe, courts examine the "fitness of the issues for judicial decision" and the "hardship" to the parties of withholding consideration. *Abbott Labs.*, 387 U.S. at 149. Plaintiffs must satisfy both prongs. *Neb. Pub Power Dist.*, 234 F.3d at 1039. They failed to do so here.

A. This case is not fit for a judicial decision.

The "fitness for judicial decision" prong goes to a court's ability to visit an issue and whether it would benefit from further factual development. *Pub. Water Supply Dist. No. 10 of Cass Cty., Mo. v. City of Peculiar, Mo.*, 345 F.3d 570, 573 (8th Cir. 2003) (internal quotation marks and citations omitted). A case is more likely to be ripe if it is not contingent on future possibilities. *See Neb. Pub. Power Dist.*, 234 F.3d at 1038; *see also Minn. Pub. Utils Comm'n v. FCC*, 483 F.3d 570, 582 (8th Cir. 2007) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal quotation marks and citations omitted). "In the context of agency decision making, letting the administrative process run its course before binding parties to a judicial decision prevents courts from 'entangling themselves in abstract disagreements over administrative policies, and . . . protect[s] the agencies from judicial interference' in an ongoing decision-making process." *Am. Petroleum Inst.v. EPA*, 683 F.3d 382, 386–87 (D.C. Cir. 2012) (citing *Abbott Labs. v. Gardner,* 387 U.S. 136, 148 (1967)). In addition to conserving judicial resources, postponing review where there are ongoing administrative proceedings "comports with [a court's] theoretical role as the governmental branch of last resort." *Nat'l Treasury Emps. Union v. United States,* 101 F.3d 1423, 1431 (D.C. Cir. 1996).

Here, the delayed applicability of the 2015 Rule and the ongoing reconsideration process make this matter unfit for judicial resolution. The Agencies have delayed the applicability of the 2015 Rule to avoid likely inconsistencies, uncertainty, and confusion regarding the scope of "waters of the United States" pending further rulemaking action by the Agencies. *See also* 83 Fed. Reg. at 5202. And EPA has proposed to repeal the 2015 Rule, an action that would rescind the 2015 Rule challenged here and recodify the regulations that pre-existed the 2015 Rule. 82 Fed. Reg. 34,899; 83 Fed. Reg. 32,227.[8]

[8] At least some of the proposed support for the Agencies' proposal is in line with the arguments made by Plaintiffs and Plaintiff-Intervenor. *See, e.g.,* 83 Fed. Reg. at 32,240 (discussing concerns about clarity, the scope of the 2015 Rule, and the scope of the Agencies' CWA rulemaking authority); States Br. 12-28 (arguing that the 2015 Rule is inconsistent with the CWA); Iowa Br. 8-13 (same). In fact, Plaintiffs here, among other challengers of the 2015 Rule,

Cont.

Indeed, some of the reasons the Agencies have cited in proposing to rescind the 2015 Rule are the same reasons the States provide in their challenges to the 2015 Rule. For example, the Supplemental Notice of Proposed Rulemaking states, "court rulings against the 2015 Rule suggest that the interpretation of the 'significant nexus' standard as applied in the 2015 Rule may not comport with and accurately implement the legal limits on CWA jurisdiction intended by Congress and reflected in decisions of the Supreme Court." 83 Fed. Reg. at 32,228; *see also id.* at 32,238 (noting this Court's findings regarding the significant nexus standard). The Agencies are also evaluating whether "many features that are categorically jurisdictional under the 2015 Rule, such as wetlands that fall within the distance thresholds of the definition of 'neighboring,' test the limits of the scope of the Commerce Clause because they may not have the requisite effect on the channels of interstate commerce." *Id*. at 32,249. The Agencies have also expressed concern that the 2015 Rule "may have altered the balance of authorities between the federal and State governments, contrary to the agencies' statements in promulgating the 2015 Rule and in contravention of CWA section 101(b), 33 U.S.C. 1251(b)." *Id*. at 32,228. Rather than expend judicial resources to resolve these issues raised in both the challenges and the rulemaking proposal to rescind the 2015 Rule, the Court should respect the prerogative of the Executive Branch to complete its reconsideration and possible replacement of the 2015 Rule.

In addition, consistent with the President's directive, the Agencies are drafting a new proposed definition of "waters of the United States." *See* 83 Fed. Reg. at 32,238 ("To provide for greater regulatory certainty, the agencies propose to repeal the 2015 Rule and restore a longstanding regulatory framework that is more familiar to and better-understood by the

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submitted comments supporting the proposal to repeal. *See* ECF No. 175-6 (state comment letters on proposed recodification of pre-existing WOTUS regulations).

agencies, our co-regulators, and regulated entities, *until* the agencies propose and finalize a replacement definition.") (emphasis added). If the Agencies finalize either the repeal rule or a new definition of "waters of the United States" (or both), this case would become moot. *Cf. Am. Petroleum Inst. v. EPA*, 683 F.3d at 387 (staying litigation when "[t]he proposed rule would wholly eliminate" the issues in this litigation). Allowing the administrative process to run its course will allow the Agencies to "crystalliz[e] [their] policy before that policy is subjected to judicial review," *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999), and avoid "inefficient" and unnecessary "piecemeal review," *Pub. Citizen Health Research Grp. v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 30 (D.C. Cir. 1984) (citation and internal quotation marks omitted).

The Court need not review a rule that will not be applicable until at the earliest February 2020 (and which this Court has already enjoined), and possibly never applicable.

B. There can be no hardship to the States if the Court declines to decide the merits at this time.

With respect to the "hardship" prong of the ripeness analysis, "[a]bstract injury is not enough. It must be alleged that the plaintiff has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged statute or official conduct." *O'Shea v. Littleton,* 414 U.S. 488, 494 (1974) (internal quotation marks and citations omitted). "[R]ipeness is peculiarly a question of timing" and is governed by the situation at the time of review, rather than the situation at the time of the events under review. *Anderson v. Green,* 513 U.S. 557, 559 (1995) (internal quotation marks and citation omitted) (finding no live dispute where agency action would not take effect absent further action by the agency). "The Plaintiffs need not wait until the threatened injury occurs, but the injury must be 'certainly impending.'"

Paraquad, Inc. v. St. Louis Hous. Auth., 259 F.3d 956, 958–59 (8th Cir. 2001) (quoting *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979)).

Plaintiff States have not been harmed by the 2015 Rule because before coming into effect, it was preliminarily enjoined by this Court. And no State faces the threat of harm because the 2015 Rule, with its applicability date delayed for more than 18 months, is not "impending" in any state. The threat of harm the States could assert in 2015 is simply not present today. It would not be present unless this Court lifted its preliminary injunction and another federal court enjoins the Applicability Rule, as Plaintiffs seem to fear.[9] Regardless, there is no hardship if the Court declines to decide the claims *now*.

For these reasons, the Court should conclude that the challenges to the 2015 Rule are not ripe at this time and hold this matter in abeyance.

II. The Agencies Did Not Violate NEPA.

Should the Court nevertheless consider Plaintiffs' procedural objections to the 2015 Rule, it should reject those claims. The CWA expressly exempts the Rule from NEPA's requirements. As such, the Agencies were not required to complete an Environmental Assessment ("EA") or an Environment Impact Statement ("EIS").

A. The CWA exempts rules defining "waters of the United States" from NEPA.

With two exceptions not relevant here, "no action of the [EPA] Administrator taken pursuant to [the CWA] shall be deemed a major Federal action significantly affecting the quality

[9] Certain other district courts are currently hearing challenges to the Applicability Rule. *See New York v. Pruitt*, Case No. 18-cv-1030 (S.D.N.Y.); *Natural Resources Def. Council v. EPA*, Case No. 18-cv-1048 (S.D.N.Y.); *S.C. Coastal Conservation v. Pruitt,* Case No. 2:18-cv-330 (D.S.C.); *Puget Soundkeeper Alliance v. Pruitt*, Case No. 15-cv-01342-JCC (W.D. Wash.); *Waterkeeper Alliance v. Pruitt*, Case No. 3:18-cv-3521-JSC (N.D. Cal.).

of the human environment within the meaning of [NEPA]." 33 U.S.C. § 1371(c)(1). This statutory exemption applies here, even though EPA jointly promulgated the Rule with the Army.

On its face, the CWA exemption from NEPA is not limited to actions taken by EPA alone. Rather, as other courts have recognized, "That [a CWA] Rule was promulgated jointly by the EPA Administrator *and* the Secretary of the Army does not defeat the fact that it represents action, in substantial part, of the Administrator." *In re U.S. Dep't of Def.,* 817 F.3d at 273 (emphasis in original); *see also Municipality of Anchorage v. United States*, 980 F.2d 1320, 1328-29 (9th Cir. 1992) (holding that an action "does not cease to be 'action of the Administrator' merely because it was adopted and negotiated in conjunction with the Secretary of the Army and the Corps"). The *Municipality* court found—under less compelling circumstances than these—that a Memorandum of Agreement between EPA and the Corps providing guidance for administration of the section 404 permitting program was exempt from NEPA under section 1371(c). 980 F.2d at 1329. The Sixth Circuit also reiterated this holding. *In re U.S. Dep't of Def.*, 817 F.3d at 273.

Here, the 2015 Rule broadly concerns the jurisdictional scope of the entire Act, including the myriad CWA programs administrated only by EPA. *See* 80 Fed. Reg. 37,054. Notably, EPA *shares* its CWA authority with the Army in only *one* section – section 404, 33 U.S.C. § 1344. Moreover, it is EPA that has the ultimate authority to determine the scope of CWA jurisdiction and that here took the lead role in the rulemaking process. *See* 43 Op. Att'y Gen. 197, 1979 WL 16529 (U.S.A.G. Sept. 5, 1979); 80 Fed. Reg. at 37,055 (describing at least six exclusively EPA programs in which the term "waters of the United States" is used). The Rule is therefore an "action of the Administrator" subject to the statutory exemption, notwithstanding the Army's joint participation. 817 F.3d at 270. Nor does the Army's voluntary preparation of an EA create a NEPA obligation where none previously existed. *See Kandra v. United States*, 145 F. Supp. 2d 1192, 1203 n.4 (D. Or. 2001) (rejecting the contention that agency, by issuing an EA, had admitted NEPA's applicability) (citing 40 C.F.R. § 1501.3(b)); *accord Olmsted Citizens for a Better Cmty. v. United States*, 793 F.2d 201, 208 n.9 (8th Cir. 1986) (agency's belief regarding degree of required NEPA analysis irrelevant to such question).

B. Even if NEPA did apply, any consideration of the Army's EA and FONSI should await reconsideration.

"NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004). NEPA does not force an agency to reach a particular substantive outcome, "elevate environmental concerns over other appropriate considerations," or select the most environmentally-friendly option. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989); *Kelley v. Selin*, 42 F.3d 1501, 1512 (6th Cir. 1995). The Court's "role 'in reviewing the sufficiency of an agency's consideration of environmental factors is a limited one,'" and the Court cannot substitute its judgment for that of the agency. *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1127 (8th Cir. 1999) (quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 555 (1978)). When the resolution of the issues involves primarily questions of fact and "requires a high level of technical expertise [it] is properly left to the informed discretion of the responsible federal agencies." *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).

At present, the Army is engaged in a reconsideration of the 2015 Rule. This proceeding may, or may not, impact certain of the Agencies' prior findings. This might impact the EA the Army voluntarily undertook relating to the 2015 Rule. Pending that, this Court should "avoid [a] premature adjudication" and "entangling [it]sel[f] in abstract disagreements over administrative policies." *Nat'l Park Hosp.*, 538 U.S. at 807.

Even if the 2015 Rule were not exempt from NEPA's requirements, and even assuming the Army failed to meet an obligation it had, any "NEPA" error in this context would be harmless. The rulemaking process itself furthered NEPA's twin goals of informed decision-making and broad dissemination of relevant environmental information to the public. *See Methow Valley*, 490 U.S. at 350; *Pac. Legal Found. v. Andrus*, 657 F.2d 829, 837 (6th Cir. 1981) (holding that no EIS was required because rulemaking itself furthered NEPA's purposes); *Wyoming v. Hathaway*, 525 F.2d 66, 68-69, 72 (10th Cir. 1975) (holding that rulemaking was akin to an EIS even without any NEPA documentation). Remand to the Army for further NEPA analysis would serve no purpose. That is especially the case here, where the Army is already reconsidering the 2015 Rule.

III. Plaintiffs' challenge to the inclusion of Interstate Waters in the definition of "waters of the United States" is untimely.

The States also challenge the inclusion of "interstate waters" in the definition of waters of the United States. States Br. 25-26; Iowa Br. 5-17. However, APA challenges to final agency actions must generally be brought within six years. 28 U.S.C. § 2401(a); *Nat'l Ass'n of Mfrs*, 138 S. Ct. at 626-27. The 2015 Rule did not change the long-standing language of section 328.3(a)(2), which includes interstate waters as a separate category of waters of the United States. Because the time to challenge that portion of the regulation is long past, those portions of the States' claims must be dismissed as untimely.

Interstate waters have long been a distinct category of waters of the United States under the Agencies' regulations, along with traditional navigable waters and the territorial seas. *See* 33 C.F.R. § 323.2(a)(4) (1978) (identifying jurisdictional "[i]nterstate waters and their tributaries, including adjacent wetlands"); *id.* at § 323.2(a)(5) (1978) (distinguishing between waters that are "part of a tributary system to interstate waters" and waters that are part of the tributary system "to navigable waters of the United States"). The specific regulatory text regarding interstate waters has not changed since 1982, although the Corps consolidated and renumbered its regulations in 1986. *Compare* 33 C.F.R. § 323.2(a)(2) (1983) (waters of the United States include "[a]ll interstate waters including interstate wetlands") *with* 33 C.F.R. § 328.3(a)(2) (1987) (same) *and* 33 C.F.R. § 328.3(a)(2) (2015) (same).

By undertaking a rulemaking relating to the "waters of the United States" and modifying certain regulations related thereto, the Agencies did not reopen the pre-2015 regulations for judicial review. The relevant inquiry under the reopening rule is whether the agency has given any "indication that [it] was reconsidering" the regulation. *Ohio Pub. Interest Research Grp., Inc. v. Whitman*, 386 F.3d 792, 800 (6th Cir. 2004). For example, in *Ohio PIRG*, EPA sought comment on whether state permit programs implemented under the Clean Air Act complied with the agency's interpretation of that statute. *Id.* The agency did not, however, "signal its reconsideration of its previous rule interpreting" that statute. *Id.* Thus, the court held that a challenge to the interpretation was time-barred.

Here, the Agencies stated in the proposal that the Rule "does not change" the Agencies' jurisdiction over interstate waters. 79 Fed. Reg. 22,188, 22,200 (Apr. 21, 2014). Although some comments addressed interstate waters, the Agencies' response was that the Rule effected no change with respect to such waters. RTC Topic 10 at 269. As the Proposed Rule, the response to comments, and the Rule all demonstrate, the Agencies neither proposed to—nor did—reconsider the inclusion of interstate waters. It did not "reopen the question" of interstate waters for purposes of judicial review. *Ohio PIRG*, 386 F.3d at 800.

Plaintiff-Intervenor Iowa points to a line of cases arising in the context of judicial review in the D.C. Circuit Court of Appeals under a *specific* statutory provision, as opposed to the APA. Iowa Br. 6-8. These cases interpreting the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, the Resource Conservation and Recovery Act and the National Trails System Act Amendments of 1983 have held that agencies might—in certain circumstances—create opportunities for renewed comments on established regulation, thus restarting the time period for judicial review. *Id.* For example, in *State of Ohio v. EPA*, 838 F.2d 1325 (D.C. Cir. 1988), the D.C. Circuit held, as Iowa points out, that if an agency responds to a comment "aimed directly at the issue," the response can reopen the period for judicial review. *Id.* at 1328-29. But the very next year, in *American Iron & Steel Institute v. EPA*, 886 F.2d 390 (D.C. Cir. 1989), the D.C. Circuit limited this holding. In doing so, it rejected Iowa's approach, cautioning that:

> [t]he 'reopening' rule of *Ohio v. EPA* is not a license for bootstrap procedures by which petitioners can comment on matters other than those actually at issue, goad an agency into a reply, and then sue on the grounds that the agency had re-opened the issue. To so read *Ohio v. EPA* would undermine congressional efforts to secure prompt and final review of agency decisions.

Id. at 397-98.

Iowa also cites *National Ass'n of Reversionary Property Owners v. Surface Transportation Bd.*, 158 F.3d 135, 141 (D.C. Cir. 1998), for the proposition that a court must look at the "entire context of a rulemaking" in order to determine whether an agency has reopened the period for judicial review. Iowa Br. 6. But that court went on to conclude that the agency did *not* reopen the period for judicial review. It dismissed the case, holding that "[t]he mere act of repeating old reasons for an old policy . . . is not the equivalent of reconsidering, and therefore reopening, the old issue." *Nat'l Ass'n of Reversionary Prop. Owners*, 158 F.3d at 145.

The same is true here. The Agencies' mere restatement of the unchanged portion of the definition of "waters of the United States" did not signal reconsideration of whether interstate waters are within the jurisdiction of the CWA.

The Agencies are not aware of any decision by the Eighth Circuit or by any court in this Circuit adopting the "reopening" rule, under either the Clean Water Act's provision for judicial review in the courts of appeal, 33 U.S.C. § 1369(b), or under the APA. *See, e.g., Homestake Mining Co. v. EPA*, 584 F.2d 862, 863 (8th Cir. 1978) (dismissing petition filed four days after expiration of section 1369(b)'s filing period); *Am. Ass'n of Meat Processors v. Costle*, 556 F.2d 875 (8th Cir. 1977) (dismissing as untimely petition filed after expiration of section 1369(b)'s filing period). But even if the reopening rule could apply in this context, the facts of this case demonstrate that the Agencies did not reopen the issue of CWA jurisdiction over interstate waters.

Iowa also asserts that the 2015 Rule "effectively amends" the existing inclusion of interstate waters in the definition of waters of the United States because the 2015 Rule also expands the definition of tributaries, adjacent waters, and case-by-case waters. Iowa Br. 8. But just as interstate waters have always been considered waters of the United States, so too have their tributaries and adjacent wetlands. *See, e.g.*, 33 C.F.R. § 323.2(a)(4) (1978) (covering "[i]nterstate waters and their tributaries, including adjacent wetlands").

Because the Agencies did not propose any changes to, or otherwise "reopen," the longstanding definition of "waters of the United States" with respect to interstate waters, the States' challenges are untimely.

IV. Plaintiffs and Plaintiff-Intervenors do not satisfy their burden of demonstrating significant procedural deficiencies.

Plaintiffs and Plaintiff-Intervenors also argue that they were not provided adequate opportunity to provide comment on the final regulatory text for the 2015 Rule, as well as a Science Report the Agencies offered to support it. But once again, this Court should avoid premature judicial entanglement "in abstract disagreements over administrative policies." *Nat'l Park Hosp. Ass'n*, 538 U.S. at 807–08. Since 2015, the Plaintiffs and other interested parties have had further opportunity to present these objections to the 2015 Rule through the Agencies' administrative reconsideration proceedings. Indeed, Plaintiffs did comment on the Agencies' recodification proposals. *See* ECF No. 175-6. And recently, the Agencies have invited further comment through a July 2018 supplemental notice of proposed rulemaking, specifically soliciting comment on matters Plaintiffs raise here. These include whether "distance-based limitations that were not specified in the proposal . . . mitigated or affected the agencies' change in interpretation of similarly situated waters in the 2015 Rule," and "on any other issues that may be relevant to the agencies' consideration of whether to repeal the 2015 Rule, such as whether any potential procedural deficiencies limited effective public participation in the development of the 2015 Rule." 83 Fed. Reg. at 32,249.

If the Agencies repeal the 2015 Rule, as they have proposed to do, this case will be moot. And even if the Agencies modify or maintain the 2015 Rule, Plaintiffs now have the opportunity to comment on the final regulatory text and all of the support for the 2015 Rule. *See Hedge v. Lynn*, 689 F. Supp. 898, 910 (D. Minn. 1988) (procedural claims moot after agency provided subsequent process). For this reason, this Court should "let[] the administrative process run its course before binding parties to a judicial decision." *Am. Petroleum Inst.*, 683 F.3d at 386–87. But if this Court reaches the merits of Plaintiffs' procedural challenges, it should reject them because Plaintiffs have not met the burden of demonstrating that the 2015 Rule was not a "logical outgrowth" of the proposed rule or lacked adequate public notice for the science underlying the final rule. [10]

A. Plaintiffs have not shown that the 2015 Rule is not a logical outgrowth of the Agencies' proposal.

Under Section 553 of the APA, a "[g]eneral notice" of proposed rulemaking must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved" and provide the public an opportunity to comment. 5 U.S.C. § 553(b)(3), (c). The purpose of these procedures is "to get public input so as to get the wisest rules," to "ensure fair treatment for persons to be affected by regulations," and "to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage." *Dismas Charities, Inc. v. U.S. Dep't of Justice,* 401 F.3d 666, 678, 680 (6th Cir. 2005) (internal quotation marks and citation omitted).

These procedures mean that a final rule can differ from a proposed rule. *Chrysler Corp. v. Dep't of Transp.*, 515 F.2d 1053, 1061 (6th Cir. 1975). Otherwise, there would be no point to inviting public comment, which is to allow an agency to reconsider, and perhaps revise, a proposed rule based on the comments submitted. *Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1058 (D.C. Cir. 2000). And a requirement that a final rule must not deviate from a proposal would "force[] [agencies] into perpetual cycles of new notice and comment periods" or "refuse to make changes in response to comments." *Id.* Thus, changes to a proposal—even substantial ones—may be made, provided the final rule is a "logical outgrowth" of the proposed

[10] While the final 2015 Rule was a logical outgrowth of the rule proposed, and the Agencies provided the public appropriate opportunity to comment on their support, the Agencies are currently reconsidering the 2015 Rule and take no position at this time on the merits of the 2015 Rule.

rule. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007); *see also Alto Dairy v. Veneman*, 336 F.3d 560, 569-70 (7th Cir. 2003) ("The purpose of a rulemaking proceeding is not merely to vote up or down the specific proposals advanced . . . but to refine, modify, and supplement the proposals in the light of evidence and arguments presented in the course of the proceeding.").

A proposed rule satisfies the logical outgrowth test if it "expressly ask[s] for comments on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009). The requirements of APA section 553 are thus satisfied "if affected parties should have anticipated that the relevant modification was possible," *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014), or if additional notice and comment "would not provide commenters with their first occasion to offer new and different criticisms." *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (internal quotation marks and citation omitted).

Here, the Agencies adequately described the subjects and issues involved in the rulemaking and invited comment from the public, including the issues for which the State Plaintiffs challenge the notice provided. While certain aspects of the final Rule were different from the proposal, the modifications to the Proposed Rule were foreseeable and, at least in part, the result of comments.

1. Plaintiffs do not establish that the distance limitations in the definition of "neighboring" were not a logical outgrowth of the proposal.

The 2015 Rule retained the 1986 regulation's definition of "adjacent" as "bordering, contiguous [to], or neighboring." 33 C.F.R. § 328.3(c)(1); *see id.* § 328.3(a)(6).[11] The States

[11] The terms "bordering" and "contiguous" are unchanged from the 1986 regulation. *See* 80 Fed. Reg. at 37,080. None of the States challenges the inclusion of those definitions.

assert that in defining "neighboring," the Agencies failed to provide adequate notice regarding the distance limitations. *See* States Br. 42-44. Specifically, "neighboring" adjacent waters are those: (1) within 100 feet of the ordinary high water mark of a primary water, impoundment, or tributary; (2) within the 100-year floodplain (but not more than 1,500 feet from the ordinary high water mark) of primary water, impoundment, or tributary; or (3) within 1,500 feet of the high tide line of a primary water or within 1,500 feet of the ordinary high water mark of the Great Lakes. 33 C.F.R. § 328.3(c)(2).

In the proposal, the Agencies did seek comment on a number of ways to address and clarify jurisdiction over "adjacent waters," including establishing a floodplain interval (e.g., a 50-year or 100-year floodplain) and providing clarity on reasonable proximity as an important aspect of adjacency. *See, e.g.*, 79 Fed. Reg. at 22,209 ("This new definition is designed to provide greater clarity by identifying specific areas and characteristics for jurisdictional adjacent waters, but the agencies request comment for additional clarification."). The public was on notice in the Proposed Rule that adjacent waters would likely be jurisdictional by rule. Though the distances contained in the final Rule identified a smaller subset of waters as "neighboring" than proposed, the final distance limitations logically grew from and were within the range of the proposed distances. *See*, *e.g.*, *Waukesha v. EPA*, 320 F.3d 228 (D.C. Cir. 2003) (rejecting logical outgrowth challenge where final metric was not expressly proposed, but was within the range of possible outcomes presented to the public).

For "adjacent" waters, the Agencies stated their intent to bring "greater clarity to the meaning of 'neighboring'" by "*defin[ing] the lateral reach*" of that term. 79 Fed. Reg. at 22,207 (emphasis added); *see id.* at 22,208-09. The Agencies noted that the term "neighboring," which was historically part of the definition of "adjacent," "has generally been interpreted broadly in practice," and that the clarification of "neighboring" was intended to capture those waters that in practice the Agencies "have identified as having a significant effect" on the chemical, physical, or biological integrity of primary waters. *Id.* at 22,207.

The Agencies' proposed definition of "neighboring" encompassed waters located within the distance limitations established by the riparian area or floodplain of a primary water, impoundment, or tributary, and waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to a primary water, impoundment, or tributary. *Id.*; *see also id.* at 22,263. The proposal further explained that, to the extent "neighboring" might be defined based on a shallow subsurface hydrologic connection or confined surface hydrologic connection, the Agencies would "assess the distance" between the water body and the jurisdictional water, as the Agencies have "always included an element of reasonable proximity" in the application of the definition of "adjacent." *Id.* at 22,207 (citing *Riverside Bayview*, 474 U.S. at 133-34); *see also* 42 Fed. Reg. at 37,128. Recognizing that in some circumstances "*the distance* between water bodies may be sufficiently far that even the presence of a hydrologic connection may not support an adjacency determination," the Agencies requested comment on a number of other options, including "*establishing specific geographic limits* for using shallow subsurface or confined surface hydrological connections as a basis for determining adjacency" and a specific floodplain interval. 79 Fed. Reg. at 22,208-09 (emphasis added). The Agencies thus informed the public that the definition of "neighboring" was intended to set a clear spatial limit as to the geographic scope of adjacent waters, based on riparian area, floodplain, and/or some distance limits, and invited comment on how best to accomplish that objective.

Importantly, comments that address an issue resolved in a final rule provide evidence that the notice was adequate. *Am. Trucking Ass'ns, Inc. v. FMCSA*, 724 F.3d 243, 253 (D.C. Cir.

2013). Demonstrating that the public fully understood that it should provide comment on these prospects, the Agencies received robust comment on these issues. Many commenters flatly rejected the idea of any distance limitations (whether based on a riparian area or floodplain or on a set distance). For example, some commenters asserted that the *Rapanos* plurality opinion, not Justice Kennedy's opinion, should be followed, and that a hydrologic connection rather than distance should be considered. *See, e.g.*, Exhibit 2 (Comments on proposed 2015 Rule, also available at https://www.regulations.gov/docket?D=EPA-HQ-OW-2011-0880), Part 1 at 1-23 (Comments of N.M. Cattle Growers Ass'n at 12; Tex. Comm'n on Envtl. Quality at 6). Others commented that there should be no distance limitation in the definition of "neighboring," asserting that chemical and biological connectivity can extend well beyond a riparian area or floodplain. Exhibit 2 (Comments on proposed 2015 Rule), Part 1 at 24-174 (Comments of Clean Water Action at 6; S. Envtl. Law Ctr. at 16-17; Earthjustice at 7; NRDC at 62); *see also* Exhibit 2 (Comments on proposed 2015 Rule), Part 1 at 175-298 (Comment of Minn. Dep't of Nat'l Res. at 2 (suggesting hydrologic criteria to determine adjacency rather than "geographic proximity"); Comment of Ducks Unlimited at 76 ("the general goal of categorically incorporating riparian and floodplain waters as jurisdictional 'adjacent waters' within the definition of 'neighboring' is appropriate")). In fact, many commenters responded to the Agencies' request for suggested distance limits by proposing specific floodplain intervals set by FEMA, riparian areas, and numerical distances. *See, e.g.*, Exhibit 2 (Comments on proposed 2015 Rule), Part 2 at 1-77 (Comments of Ky. Oil & Gas Ass'n at 8 (recommending 100-year floodplain for larger order streams, and the riparian zone within 50 feet of the ordinary high water mark for smaller order streams); Ctr. for Rural Affairs at 5 (recommending floodplains and riparian areas as "clear, water body-specific, physical boundaries"); Nat'l Lime Ass'n at 15 (supporting 5-year floodplain); NAIOP at 5 (recommending 100 feet from a subsection (a)(1)-(5) water or the floodplain of such a water); Fla. Crystals Corp. at 10 (suggesting a 200 foot limit); AASHTO at 8 (supporting floodplain, riparian zone, or specific geographic limits such as distance limitations based on the bank-to-bank width of the jurisdictional water); Hancock Cty. Drainage Bd. at 1 (suggesting a distance in feet from the jurisdictional water); N.M. Mining Ass'n at 2-3 (suggesting one-half mile)); *see also* Exhibit 2 (Comments on proposed 2015 Rule), Part 2 at 78-108 (NAM Comments at 22 (citing a case in which a water 125 feet from a tributary was found to have no significant nexus)). These comments demonstrate that the floodplain and numerical distance limitations in the final definition of "neighboring" were sufficiently presented to the public in the "general notice" of proposed rulemaking that section 553 of the APA requires. *Cf. E. Tenn. Natural Gas Co. v. FERC*, 677 F.2d 531, 536 (6th Cir. 1982) (rejecting notice claim where parts of a final rule were shaped by the comments on the proposal). The Agencies then responded to the comments on the proposed definition of "neighboring" by setting a specific floodplain interval and numerical distance limits. 80 Fed. Reg. at 37,082-84.

The APA did not require the Agencies to propose the precise numerical distance limits that were adopted. *See Chrysler Corp.*, 515 F.2d at 1061 (proposed rule provided adequate notice regarding headlamp specifications, even though the agency did not mention any time limitation attached to the specifications in proposal); *Ala. Power Co. v. OSHA*, 89 F.3d 740, 744 (11th Cir. 1996) (final standard setting out specific weight of fabrics for clothing worn by employees exposed to flames or electrical arcs was a logical outgrowth of proposal that did not propose any weights but did state objective to prevent burn injuries); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 548 (D.C. Cir. 1983) (although proposal "did not list specific 'loopholes' that EPA might try to close," the final rule's past production requirements for "small" refiners was a logical outgrowth of the proposal); *City of Waukesha*, 320 F.3d at 232 (affirming the final rule of 30 mg/L, though the proposals were 20, 40, or 80 mg/L). Instead, the Agencies provided a range of possibilities by proposing to define "neighboring" in terms of riparian areas, floodplains, and distances beyond floodplains. 79 Fed. Reg. at 22,207-08. *Cf. Kennecott v. EPA*, 780 F.2d 445, 452 (4th Cir. 1985) ("the agency is not required to specify every precise proposal that it may eventually adopt"). Commenters recognized that a distance limitation based on a floodplain could result in the inclusion of waters "miles away" from a jurisdictional water, depending on the flood interval selected. *See*, *e.g.*, Exhibit 2 (Comments on proposed 2015 Rule), Part 2 at 109-229 (Comments of N.D. at 9; Water Advocacy Coal. at 50). Several commenters understood that the term "floodplain" could mean a 500-year floodplain. Exhibit 2 (Comments on proposed 2015 Rule), Part 2 at 124-267 (Comments of Water Advocacy Coal. at 50; AFBF at 12; V. Watson). As such, the distances adopted in the Rule constituted a "natural subset" of what these informed commenters believed to be within the potential scope of the proposal's treatment of "neighboring." *La. Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1081 (D.C. Cir. 2003) (upholding a "natural subset" of the proposal against a logical outgrowth challenge).

2. Plaintiffs have not shown the distance limitations for case-specific waters were not a logical outgrowth.

The State Plaintiffs also fail to establish they lacked "proper notice" of the distance limitations contained in the case-specific category of waters. States Br. 45. In the 2015 Rule, waters within the 100-year floodplain of a primary water, or within 4,000 feet of the high tide line or ordinary high water mark of a primary water, impoundment, or tributary, are subject to case-specific significant nexus determinations. 33 C.F.R. § 328.3(a)(8). But, notably, these waters were already subject to a case-specific determination of significant nexus following

Rapanos. Moreover, the waters subject to case-by-case determinations in the final 2015 Rule are a subset of those waters proposed for case-specific determinations in the Proposed Rule.

The Agencies made clear they proposed to provide clarity and predictability by limiting the case-specific category of waters to those waters "sufficiently close" to a jurisdictional water. 79 Fed. Reg. at 22,200, 22,211, 22,213, 22,217, 22,247, 22,263. Specifically, the Agencies proposed that case-specific significant nexus determinations be based on a record that included all available information, the first item of which would be the "location" of the water body, and sought comments on this approach. *Id.* at 22,214. Thus, even though the proposal did not contain the specific distances adopted in the Rule, at least the "germ" of a distance limitation was contained in the proposal. *NRDC v. Thomas*, 838 F.2d 1224, 1242 (D.C. Cir. 1988).

As with the proposal to define "neighboring" by reference to a specific lateral limit, the Agencies received numerous comments on case-specific determinations of significant nexus. For example, some commenters recognized the distance component in the proposal and asked the Agencies to specify what distance would be considered "sufficiently close." *See, e.g.*, Exhibit 2 (Comments on proposed 2015 Rule), Part 1 at 20-48; 124-229; 260-67 (Comments of Nat'l Lime Ass'n at 11; NAIOP at 2; Water Advocacy Coal. at 58; Wis. Wetlands Ass'n at 3). Others rejected the use of distance limitations altogether, or suggested that distance should not be the sole factor in considering whether a water should be subject to a case-specific analysis. Exhibit 2 (Comments on proposed 2015 Rule), Part 1 at 106-174 (Comment of NRDC at 54-55); Part 2 at 268-83 (Comments of Mo. Coal. for the Env't at 6); & Part 3 at 1-107 (NWF at 59-60); *see also* Exhibit 3 (Science Advisory Board Proposed Rule Review at 3) (suggesting that distance not be the sole indicator for evaluation of case-specific waters).

The stated purpose of the rulemaking was to provide greater certainty. The Agencies also proposed to limit case-specific analyses to waters "sufficiently close" to a jurisdictional water, which would be determined based in part on their location. As shown by the comments received, notice of what the Agencies were seeking comment on, and the range of options proposed, was adequate to meet the requirements of the APA.

3. Any failure by the Agencies to provide specific notice that adjacent waters do not include waters used for certain agricultural activities was harmless error.

State Plaintiffs contend that the Proposed Rule did not provide adequate notice that the Agencies might conclude that waters used for normal farming, silviculture, and ranching activities should not be considered "adjacent." States Br. 46; *see* 33 C.F.R. § 328.3(c)(1). But even if there was a deficiency in notice, the APA directs reviewing courts to take "due account" of "the rule of prejudicial error." 5 U.S.C. § 706. Where a court finds that a procedural deficiency does not defeat the purpose of the bypassed requirements, it may conclude that the error was harmless. *United States v. Utesch*, 596 F.3d 302, 312 (6th Cir. 2010) (citing examples of application of "harmless-error rule" in APA review context). Even where a final rule is an abrupt departure from a proposed rule, "if parties directed comments to such a denouement, it might well be properly regarded as a harmless error—depending on how pointed were the comments and by who[m] made." *Allina Health Servs.*, 746 F.3d at 1109-10. Where a petitioner itself made such a comment, "it would presumably be hoist on its own petard." *Id.* at 1110. And where a comment was made by others, if it were the same comment the petitioner would have made, "it would still presumably be non-prejudicial because all that is necessary in such a situation is that the agency had an opportunity to consider the relevant views." *Id.* Here, there is no harm as a result of any deficiency in notice.

Notably, the record already contains many examples of comments that tributaries should not be determined to be jurisdictional as a category rather than on a case-specific basis. *See, e.g.*, Exhibit 2 (Comments on proposed 2015 Rule), Part 2 at 124-229 (Comment of Water Advocacy Coal. at 45-47) & Part 3 at 108-22 (Comment of Mich. Farm Bureau at 7). Further, numerous commenters requested specialized treatment for agricultural activities in virtually all aspects of the 2015 Rule. *See, e.g.*, Exhibit 2 (Comments on proposed 2015 Rule), Part 3 at 123-202 (Comments of Tex. at 4; Western States Water Coalition at 2, 5; Nev. DNR at 6; W. Va. DEP at 9; Kan. Agric. Alliance at 4); *see also* Exhibit 4 (Agencies' Response to Comments on 2015 Rule; Topic 8 at 30-31). It was reasonably foreseeable that the Agencies might adopt special treatment for agricultural use waters in some contexts but not others. *See Long Island Care at Home*, 551 U.S. at 175. In any event, the Agencies already had the full benefit of these comments. *Cf. Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d at 1059 (no prejudicial error where petitioners commented on alternative standards in all contexts but agency only adopted alternative standards in one context).

In sum, any deficiency in notice regarding the scope of adjacent waters with respect to waters used for normal agriculture is harmless. The Agencies had the full benefit of related comments from Petitioners and others. Thus, the purpose of notice was not frustrated.

B. The Agencies provided the public adequate opportunity to comment on their Science Report.

Concurrent with the publication of the Proposed Rule, the Agencies made available a Draft Science Report. Exhibit 5 (2015 Rule Draft Science Report at 1-1); 79 Fed. Reg. at 22,189. The Agencies also extended the comment period to allow for comment on the Science Advisory Board peer review of the draft Report. 79 Fed. Reg. 61,591 (Oct. 14, 2014).

Despite this, Plaintiff-Intervenor Iowa asserts that it had no meaningful opportunity to comment, ostensibly because the final Science Report did not publish until after the close of the public comment period. *Id.* This argument does not withstand scrutiny.

Under the APA's notice and comment requirements, technical studies and data upon which an agency relies must be made available for public evaluation. *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008). But meaningful participation does not require an opportunity to comment on "every bit of information influencing an agency's decision." *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 326 (5th Cir. 2001) (citation and internal quotation marks omitted); *see also Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006) (same). Moreover, an agency may add supporting documentation for a final rule in response to comments, as well as supplementary data that expands on or confirms the information contained in the proposed rule, so long as no prejudice is shown. *Id.* at 1076.

A party objecting to an agency's delayed publication of documents must indicate with "reasonable specificity" how the challenger may have responded if given the opportunity. *Texas v. Lyng*, 868 F.2d 795, 799 (5th Cir. 1989). Iowa does not state what comments it would have provided based on the Final Science Report.

EPA's Science Advisory Board did recommend revisions to "improve the clarity of the Report, better reflect the scientific evidence, expand the discussion of approaches to quantifying connectivity, and make the document more useful to decision-makers." Exhibit 6 (Science Advisory Board Report Review at cover letter). It did not, however, recommend a "new" approach. Nor did the Science Report adopt one. Rather, the final Science Report clarified and expanded upon concepts and topics in the Draft Science Report.

Further, there were many comments on the Science Advisory Board's review of the Draft Science Report and on the concept of connectivity on a gradient that were submitted to the rulemaking docket. *See, e.g.*, Exhibit 2 (Comments on proposed 2015 Rule), Part 1 at 106-174 (NRDC at 33-34, 36); Part 2 at 124-229 (Comment of Water Advocacy Coal. at 24-28). These comments show that the public was apprised of the Agencies' support and able to provide input.

To the extent Plaintiff-Intervenor implies it was deprived of the opportunity to submit comments regarding scientific sources added to the Science Report, or other changes to the Draft Science Report, Iowa Br. 18, nowhere does Iowa identify a specific source or provide the substance of such additional comments, or how they would have differed from those already submitted. In fact, the majority of the 353 supplementary sources were posted to or identified in the rulemaking docket prior to the close of the comment period, including: 102 scientific citations included on the Agencies' list of additional supporting materials (*see* Exhibit 7); 59 citations included in the Science Advisory Board review of the Draft Science Report (*see* Exhibit 6 at B-1 through B-5); 22 citations in references that were added to the docket and are part of the record, including the references cited in the Arid West Report (*see* Exhibit 8 at 77-102); and one cite listed in the Proposed Rule. Other citations were included in comments to the Proposed Rule or in attachments to such comments. *See*, *e.g.*, Exhibit 2 (Comments on proposed 2015 Rule), Part 3 at 203-17 (Utility Water Act Group Comment at App. A-1, citing James P. Hurley et al., *Influences of Watershed Characteristics on Mercury Levels in Wisconsin Rivers*. 29 ENVTL. SCI. & TECH. 1867 (1995)).

Of the remaining citations, 120 provided additional support for statements and conclusions already in the Draft Science Report; 23 provided new information, mostly on effects of human-altered systems to address comments in the Science Advisory Board's peer review of the Draft Science Report; and six discuss various methods and metrics to quantify connectivity in response to the SAB's peer review, an issue that has not been raised by any party.

The Agencies' Draft Science Report provided appropriate notice of the scientific underpinnings of the Final Rule, and Plaintiff-Intervenor fails to demonstrate otherwise.

V. The Agencies take no position on the merits of the substantive claims at this time.

While the Plaintiffs have not met the burden of demonstrating that the Agencies' procedures relating to the 2015 Rule were legally defective, the Agencies take no position on Plaintiffs' and Plaintiff-Intervenor's substantive objections to the 2015 Rule. As noted above, the Agencies are engaged in an ongoing rulemaking proposing to repeal the 2015 Rule. There is a substantial overlap between the issues raised in the proposed repeal and the challenges brought by the States here. *See supra* at 13-18. So the Agencies take no position at this time on the issues subject to reconsideration. *See Iowa League of Cities v. EPA*, 711 F.3d 844, 871 (8th Cir. 2013). These include, *inter alia*, the 2015 Rule's substantive interpretation of "similarly situated," 83 Fed. Reg. at 32,240; constitutional questions, *id*. at 32,241; the 2015 Rule's consistency with the policy goals of the CWA, *id*. at 32,246; and whether the 2015 Rule would cover isolated wetlands and, if so, whether that would exceed the CWA's statutory limits, *id*. at 32,249.

Instead, the Agencies respectfully request that the Court apply the prudential ripeness doctrine and hold the adjudication of any such issues in abeyance because "the disputed matter that forms the basis for [the Court's] jurisdiction has thus become a moving target," and the Agencies "would face more uncertainty" if the Court "were to rule in the midst of the [Agencies'] ongoing rulemaking process." *Wyoming v. Zinke*, 871 F.3d 1133, 1142-43 (10th Cir.

2017) (holding appeal prudentially unripe where regulation under review was subject to ongoing reconsideration and had been enjoined).

CONCLUSION

For the foregoing reasons, the Court should conclude that these challenges are not ripe, and withhold adjudication of Plaintiffs' and Plaintiff-Intervenor's claims at this time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2018, I filed the foregoing using the Court's CM/ECF system, which will electronically serve all counsel of record registered to use the CM/ECF system.

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